



candidate. The appointing authority also appointed Kurt D. Dillon, the fifth ranked candidate.

On appeal, the appellant argues that he has been bypassed a total of three times for promotion to Fire Lieutenant. The appellant contends he has been employed for 14 years since May 7, 2004, has received numerous commendations and awards during that time, and he has served as Acting Lieutenant on three separate occasions. The appellant explains that, in addition to the education and qualifications listed on his resume, he was tutored by Michael Terpak, Deputy Chief of the Jersey City Fire Department and dedicated numerous hours and hundreds of dollars to be the top scoring candidate on the promotional examination. The appellant contends that he possesses 36 college credits in Firefighting and Emergency Medical Services, which the candidates who were appointed do not possess. The appellant adds that he served as union president for FMBA Local 51 and he plans to receive the FMBA Brotherhood Metal of Valor and other commendations. The appellant explains that he is a State Certified Level 1 Emergency Services Instructor, and he possesses Incident Management Levels 1, 2 and 3 credentials which the other candidates do not. The appellant explains that the bypass was done for retaliatory purposes.

Specifically, the appellant explains that he filed a complaint against then City Solicitor, John Kearney, for the promotion of nepotism in the department. The appellant states that the Fire Chief, Brian Hagan, removed the appellant from Acting Lieutenant position and appointed his nephew Patrick Hagan to the acting position. He received a response on August 15, 2014 from the City Solicitor indicating that his complaint was invalid. Further, the appellant was bypassed in favor of Patrick Hagan, who was the number 2 ranked candidate and the nephew of the Fire Chief. He adds that the Fire Chief is on the committee that makes the new appointments. The appellant contends that he filed a grievance with the local FMBA pertaining to the above-mentioned relatives working in violation of the appointing authority's nepotism policies, which was denied. The appellant adds that Councilman James Johnson and Fire Chief Hagan interviewed him as a part of the appointing committee. The appellant states that they should have recused themselves based on prior complaints that he filed against them. The appellant adds that in memorandums dated May 8, 2018 and May 21, 2018, Fire Chief Hagan stated that the candidates who were promoted were better qualified than the appellant. The appellant contends that the aforementioned memorandums are retaliatory in nature as a result of his prior complaints against the aforementioned individuals.

The appellant asserts that the appointing authority's rationale for hiring the appointed candidates, that they excelled in the interview and had a more favorable employment history than the appellant, are subjective opinions and biased against him. The appellant explains that, during the interview, no score or answer sheets

were recorded. The appellant asks the appointing authority to submit such answer sheets for review if they exist. The appellant adds that he has never been subjected to an evaluation or an employee performance review in the 14 years that he has been employed at the appointing authority. As such, he cannot provide any performance evaluations from the appointing authority in support of his appeal. The appellant states that he is an Emergency Medical Technician with Cooper Hospital and his reviews indicate that he “is a valued performer [and] ... works in a challenging environment.” The appellant questions how the appointing authority in a memorandum could state that the fifth ranked candidate was more knowledgeable about the fire department than himself. The appellant states that the only question he recalls that he was asked was pertaining to interstate highway operations. Moreover, the appellant contends that, with respect to the appointing authority’s assertion that he used more sick leave than the other candidates, he provided medical excuses for the dates he was out sick. The appellant adds that he used 12 weeks of Family Medical Leave Act time when his daughter was born, and he has never been counseled with regard to his use of leave time. As such, the appellant does not understand how his use of leave time could prevent him from being appointed. The appellant adds that, with respect to his disciplinary record, he was provided with copies of reprimands from over 10 years ago. The appellant states that it is common practice that reprimands are to be removed from a personnel file within one year of the incident. The appellant states that he reviewed his personnel file in 2015 and the reprimands were not removed. The appellant contends that in 2008, his partner “nudged him” to wake up for an assignment. He states that he had worked 24 hour shifts and he was permitted to sleep. The appellant states that in 2009, he lost 24 vacation hours despite that his doctor indicated that he experiences sleep apnea. The appellant adds that he was counseled for being one minute late for work by provisional Fire Chief Patrick Hagan. The appellant reiterates that he was counseled in retaliation as a result of the previous complaints that he filed. The appellant adds that there are employees who were appointed with more extensive disciplinary histories than his own. The appellant explains that he requested a record indicating that he trained as an instructor, but the appointing authority did not provide such records to him.

The appellant contends that one candidate who was appointed, Jeffrey Sanderson, was charged and convicted with “Simple Assault” and “Harassment” on March 13, 2018. He argues that it is concerning that the appointing authority listed an “extensive disciplinary record” as the reason for bypassing him, yet it promoted an individual to Fire Lieutenant with a history of criminal convictions. Additionally, regarding candidate, Kurt Dillon, who the appointing authority indicated provided more departmental training than he did, the appellant contends that he was not asked to provide such training and he provided training sessions on his own accord without being asked while serving as Acting Lieutenant.

In support, the appellant provides information from a Municipal Court Case Search system indicating that Jeffery Sanderson was arrested on December 10, 2017 for Simple Assault-Purp/Know B.I., Fight/Scuffle by Consent. Sanderson plead not guilty on March 13, 2018 and the matter was dismissed. The appellant also provides a copy of a printout entitled "Training Classes by Instructor" including dates from May 7, 2004 through October 16, 2018. It indicates various codes but does not indicate that the appellant specifically instructed any classes. However, it indicates that the appellant attended nine classes between June 27, 2014 and September 9, 2015. Additionally, the appellant provides a copy of his resume; Incident Management Level 1, Level 2, and Level 3 certificates issued by the Department of Community Affairs; an Instructor Level 1 certificate; a transcript listing of the fire and emergency courses that he has passed; several letters of appreciation and awards.

In response, the appointing authority, represented by Howard C. Long, Jr., Solicitor, provides a memorandum dated May 21, 2018 from Chief Hagan, which indicates that, on May 17, 2018, the Mayor and Common Council of Gloucester City appointed Kurt Dillon to Fire Lieutenant. In this regard, during the interview, Dillon was more knowledgeable about the Gloucester City Fire Department than the appellant. Personnel and attendance records were also taken into account and it was determined that Dillon only used 41 hours whereas the appellant used 375.5 hours of leave time. Further, it indicates that Dillon did not evidence any disciplinary records in his personnel file, while the appellant had an "extensive" disciplinary record. The appointing authority adds that Dillon has several letters of recommendation from the Gloucester City Fire Department's supervisors, while the appellant did not have any letters of recommendation. Finally, it indicates that Dillon has "extraordinary" good character. Additionally, a memorandum from Chief Hagan dated May 8, 2019 indicates that the Mayor and City Council appointed Robert Glassman and Jeffery Sanderson to Fire Lieutenant. It explained that they were appointed as they excelled in the interview process and had more favorable employment histories than the appellant. The appointing authority states that it has the authority to select any of the top three candidates under the Rule of Three, and the proper candidates were selected based on their qualifications, education, and experience. Moreover, the appointing authority submits information to show that Robert Glassman and Kurt Dillon obtained an Incident Management Level 1 certificate from the New Jersey Department of Community Affairs.

## CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *N.J.A.C.* 4A:2-1.4(c) provides that the appellant

has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper.

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. *See Jamison v. Rockaway Township Board of Education*, 242 N.J. Super. 436 (App. Div. 1990). *In Jamison, supra* at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a *prima facie* case showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the decision. For the reasons set forth below, the appellant has not presented a *prima facie* case in this matter.

Initially, the appellant cannot attempt to relitigate information pertaining to his previous bypasses, as he argued such information pertaining to Patrick Hagan's appointment in a prior matter. *See Oliver, supra*. The Commission previously reviewed that matter and it determined that the bypass was not improper.

A review of the certification indicates that the appellant has failed to meet his burden of proof. The appellant has not shown by a preponderance of the evidence that the decision to bypass his name was improper. Specifically, with respect to the appellant's contentions that a lower ranked candidate was appointed, an appointing authority is not obligated to provide a candidate with the reasons why a lower ranked candidate was appointed. *See Local 518, New Jersey State Motor Vehicle Employee Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles*, 262 N.J. Super. 598 (App. Div. 1993). However, upon his appeal, the appellant was provided with the reasons for his bypass and was provided an opportunity to respond to these reasons. Moreover, there is no substantive evidence that he was retaliated against based on his prior complaints, grievances or position as union official. The appellant's mere contentions without more, such as contemporaneous documentation or other evidence, is insufficient to establish a *prima facie* case. Additionally, the appellant's argument pertaining to his service as Acting Lieutenant does not establish the appellant's contentions that he was the most qualified candidate, as Civil Service laws and rules do not recognize "acting" titles.

The appointing authority, in response to the appellant's appeal, has provided specific reasons for bypassing his name for appointment, namely, that Dillon, Glassman, and Sanderson were better suited to the position due to their education, knowledge, experience, and letters of recommendation. It has also indicated that the appellant utilized extensive leave time in comparison to Dillon and also had a disciplinary history. While the appellant attempts to minimize such factors, it is

clear that they are permitted to be used as factor in allowing an appointing authority to exercise its hiring discretion. Even assuming, *arguendo*, the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the Rule of Three to appoint a lower-ranked eligible absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*. There is nothing in the record to indicate that the appellant's non-selection was based on an unlawful motive. Compare, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 *N.J. Super.* 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). As noted above, there is no evidence to establish that the appellant's bypass was unlawfully retaliatory in nature or otherwise based on an unlawful motive. Moreover, the appellant does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990).

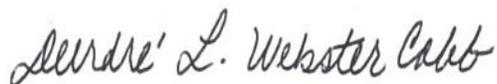
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Fire Lieutenant (PM1163S), Gloucester City, eligible list, was proper and the appellant has failed to meet his burden of proof in this matter.

### ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 27<sup>th</sup> DAY OF MARCH, 2019



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